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Citation for final published version:

Doughty, Julie 2020. Remote justice - family court hearings during the pandemic. *Journal of Social Welfare and Family Law* 42 (3) , pp. 377-380. 10.1080/09649069.2020.1796221

Publishers page: <http://dx.doi.org/10.1080/09649069.2020.1796221>

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Remote justice – family court hearings during the pandemic

Key words: COVID-19; care proceedings; right to a fair trial

In ***Re A (Children) (Remote Hearing: Care And Placement Orders)***

[2020] EWCA Civ 583, the President of the Family Division, Sir Andrew McFarlane, set out explicit guidance to judges in England and Wales on decisions to be made about holding a hearing 'remotely', that is, through online participation instead of in the traditional court room. *Re A* was the first appeal in a case relating to the welfare of children to be heard by the Court of Appeal on the issue of remote hearings during the COVID-19 pandemic.

This case note discusses *Re A* and other reported judgments involving decisions on remote hearings and those held partly in the courtroom and partly remotely, known as hybrid hearings.

On 23 March 2020, the UK government announced a state-wide lockdown, restricting freedom of movement, as a response to the spread of the coronavirus and threat of Covid-19 overwhelming the National Health Service, closely followed on 25 March by the passing of the Coronavirus Act 2020. Consequently, hearings scheduled in court buildings across the country could no longer take place. However, a central principle of the Children Act 1989 is the avoidance of delay that is not in the child's welfare. Building on the increasingly common use in family court hearings of some parties giving evidence by video link in certain circumstances, the possibility of an entire hearing being undertaken online had to be explored. A series of practice guidance documents on the use of remote and hybrid hearings was issued by the senior judiciary from 19 March onward.

On 22 April, the President, Peter Jackson LJ and Nicola Davies LJ, heard *Re A*, an appeal from Carlisle Family Court. The issue at the heart of the case was that one of the children subject to an application for care and placement orders was approaching his fourth birthday and the Family Court judge had taken particular

note of the impact of further delay in proceedings on his being successfully matched with prospective adopters. As at 17 April, the judge had written in a case plan: "... X will be 5 in June and research shows that the chances of an adoption being successful decrease significantly around that age". Hence, he had given case management directions with a view to minimising delay. There was an error in that X was aged three, about to turn four. Research does tend to fix five as the age of an 'older' child in this context (Brind, 2008). Nevertheless, the local authority and children's guardian initially agreed that the adoption process added an extra factor of urgency. The children had all been removed more than a year earlier, and four of them were still awaiting certainty about their permanent homes. The judge had directed that a hybrid hearing be listed during late April to May, with the parents and their barrister in the court room with him while they gave evidence, while other parties could attend remotely and the parents connect from home during the other submissions and evidence.

The President took the opportunity to consolidate and expand on the existing guidance. Final hearings in contested care or placement for adoption applications had not been categorised as suitable for remote hearing. However, it is possible that a particular final care or placement for adoption case may be heard remotely while the lockdown continues. The task of determining whether or not a remote hearing should take place is one for the judge to whom the case has been allocated, with regard to the principles and guidance set out in detail in para 9. The factors will vary from case to case, but include: urgency; the available technology; and any safe options for partial attendance in a court room. One of the factors is:

The ability, or otherwise, of any lay party, especially a parent, to engage with and follow remote proceedings meaningfully. This includes access to and familiarity with the technology, funding, their intelligence and personality, language, and their ability to instruct their lawyers (before and during the hearing)[para 9 point iv]

It is this factor that has attracted particular concern about parents' effective participation in the context of the Article 6 right to a fair trial.

In *Re A*, the combination of technical, emotional, intellectual and environmental factors meant that it was not possible for the children's father to engage sufficiently with the professional evidence. This would have to be given over a video link to his wife's iPad in his home over several days. The court could not be assured that the process could be regarded as adequate or fair. The matter was sent back for new directions.

Heard next day, *Re B, (Children) (Remote Hearing: Interim Care Order)* [2020] EWCA Civ 584 was a very different situation. An interim care order had been made in respect of a nine-year-old child in an urgent remote telephone hearing, with the child's immediate removal from his special guardian to foster care. The Court of Appeal set aside the order. The nature of the remote hearing had led to a loss of perspective in relation to the need for an immediate decision. There should have been an adjournment to allow time for a more considered decision to be made. The President said:

A remote hearing, where it is appropriate, can replicate some but not all of the characteristics of a fully attended hearing. Provided good practice is followed, it will be a fair hearing, but we must be alert to ensure that the dynamics and demands of the remote process do not impinge upon the fundamental principles. [para 4]

Prior to *Re A*, on 16 April, the President had conducted a hearing in the Family Court, *Re P (A Child) (Remote Hearing)* [2020] EWFC 32 on arrangements for a 15 day hearing in a case of alleged fabricated illness. He described the experience of a judge viewing up to five 'postage stamp' images of parties on a screen as a poor substitute for having the person in court throughout. A remote hearing of such complex factual issues would be 'wholly out-with any process which gives the judge a proper basis upon which to make a full judgment' [para 26]. A remote hearing for a final hearing of this sort would not allow effective participation and engagement by the mother.

In *A Local Authority v a Mother* [2020] EWHC 1086 (Fam), Lieven J was considering the resumption of a fact-finding hearing following the conclusion of

medical evidence on the death of a two month old baby in April 2019. The child in the care proceedings was four, and had been in foster care for a year. The mother and father both denied they had caused the catastrophic injuries which had been found in the post mortem on his baby sister. The judge agreed with the local authority that it was very important for the boy to know where he would be living before he started school in September and that further delay would be seriously detrimental to him. His mother had asthma and did not want to attend court to give evidence but no one knew how long the lockdown would continue or at what point she might be willing to attend court. Apart from an indefinite adjournment, there was no safe alternative to a remote hearing. The judge applied the *Re A* factors in her analysis and also considered *Re P* and the concept of demeanour. However, she concluded that it could not be said which forum was more likely to elicit the most truthful and revealing evidence. A remote hearing should take place, although she would continually revisit the issue of the fairness of the proceedings.

There have been two subsequent cases where parents unsuccessfully argued that remote arrangements would be a breach of their Article 6 right to a fair trial. In *Re C (Children: Covid-19: Representation)* [2020] EWCA Civ 734, the Court of Appeal considered directions that had been made for a fact finding hearing where a three-year-old child had died from cocaine ingestion. Decisions needed to be reached on the welfare of her four siblings, all in foster care for more than a year. There was to be a hybrid hearing because a combination of circumstances meant that the mother's lead counsel could not attend the court building and would attend remotely. The mother argued that she could not participate effectively if she was not in the same room as her QC. The court disagreed. Following analysis of the European Court of Human Rights cases, Peter Jackson LJ observed:

Perfection in the arrangements for a complex trial of this kind is not always achievable and the contemplated arrangements comfortably satisfy the requirements for a fair hearing. [para 24]

In *Lancashire County Council v M & Ors (COVID-19 Adjudication Application)* [2020] EWFC 43, a fact-finding hearing was needed on whether serious injuries to a five-week-old baby had been caused by his mother, father or both. The case had been ongoing for more than 18 months, almost the entire life of the child, now in a foster-to-adopt placement. Because of the father's objections to a remote hearing, efforts had gone into finding a court room large enough to hold a face-to-face hearing. The local authority had offered to pay for both parents to travel by taxi from their home to this court because they did not want to use public transport. However, the father argued for further, indefinite, delay on the basis that he suffered from anxiety to the extent that he could only contemplate attending court locally. The judge, MacDonald J, applied the *Re A* guidance closely to conclude that the face-to-face trial should go ahead, with a contingency that the father and his barrister might join remotely. This judgment emphasised that the child has his own Article 6 rights to a fair and timely decision making process.

Reference is made in *Re A* [para 6] to an independent review that was being undertaken at the President's request. A report on this review was published on 6 May (Nuffield Family Justice Observatory 2020). It contains a range of examples of concerns about effective participation and is no doubt being taken into account in developing further guidance, with remote hearings anticipated to continue in the short to medium term.

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